SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 961

MAX WRIGHT, *Petitioner,*

v.

MASONITE CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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The petitioner and the plaintiff in this civil suit action respectfully pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on October 19, 1966.

Opinions Below

The opinion of the District Court for the Middle District of North Carolina is reported at 237 F. Supp. 129 (1965). The opinion of the Court of Appeals for the Fourth Circuit is reported at — F. 2d ——.

Jurisdiction

The Judgment of the Court of Appeals for the Fourth Circuit was made and entered on October 19, 1966 (R 38), and copy thereof is appended to this Petition in the Tran-

script of Record at pp. 23-36. The jurisdiction of this Court is invoked under 28 U.S.C. 2101 (c).

Questions Presented

The petitioner owned a small grocery store in Thomasville, North Carolina. The respondent constructed and operated a plant adjacent to petitioner's grocery store. Poisonous and noxious fumes from the respondent's plant entered petitioner's grocery store and substantially destroyed the business and livelihood of the petitioner.

The evidence substantiated that respondent expelled the fumes into the atmosphere because they were noxious and intolerable in respondent's own plant and were therefore exhausted by powerful fans, thereafter entering petitioner's grocery store and destroying his business. However, the District Court, while finding that petitioner was damaged substantially, held that the law of the state did not permit recovery because petitioner had failed to show that respondent knew the fumes were causing damage to petitioner, although respondent knew that the fumes were being deposited in the air around petitioner's store.

The Court of Appeals affirmed the District Court, with Judge Bryan dissenting. In substance, the majority of the Court held that the law of North Carolina required an "intentional" invasion of the petitioner's property in order to recover. In his dissent, Judge Bryan held that the issue was not whether the injury was intentional but whether the causative acts were intentional. In this connection, the District Court stated in its Findings of Fact as follows:

> "The defendant knew for a number of years that it was discharging the fumes from its finishing plant, including fumes from the synthetic materials used in its spray booth containing urea-formaldehyde, into the atmosphere." See Appendix, Page I (15).

The sole question presented is:

1. Whether the decision of the majority of the Court of Appeals for the Fourth Circuit is in conflict with the Law of North Carolina in holding that in order to constitute actionable nuisance the wrongdoer must intend the specific invasion of another's property, or whether it is sufficient under the Law of North Carolina if he intended to do the acts which were necessarily calculated to cause the invasion.

Statutes, Federal Rules and Regulations Involved

There are no statutes, rules, or regulations directly pertinent to this Petition.

Statement

For seventeen years, petitioner operated a small grocery store in a residential area in the small town of Thomasville, North Carolina. Masonite Corporation constructed a plant next door to petitioner's grocery store and shortly after the plant began operating, the facts occurred out of which this action arose.

Masonite Corporation used various chemicals in its plant, including chemicals which had by-products of formaldehyde and ammonia. In December, 1962, Masonite Corporation installed an elaborate exhaust system in its plant which blasted 40,000 cubic feet of air per minute out of the plant into the air around the plant and petitioner's store. During January and February of 1963, large quantities of urea-formalhehyde were deposited into the air surrounding petitioner's store.

The poisonous formaldehyde fumes entered the groceries in petitioner's store causing them to become contaminated. For several frantic weeks, petitioner searched for the source of the poisonous fumes and before he was able to find it, was required to close his business in order to protect the public

health. Subsequently, the health officials of the State formally closed the store.

Respondent, Masonite Corporation, was successful with its elaborate exhaust system in getting the fumes out of its plant, and thereby, it was able to carry on its business. The identical act which enabled Masonite Corporation to carry on its business resulted in petitioner being unable to carry on his business which was in its second decade of operation when Masonite began its operation in the neighborhood.

The petitioner rests upon the facts of this case as found by the District Judge and therefore references to an extensive record are not indicated. It is the law which arises on the established facts which is in issue. We contend that the Court of Appeals for the Fourth Circuit has made a decision which not only seriously conflicts with the Law of North Carolina but also sets a dangerous precedent. If allowed to stand, the decision will allow the petitioner to be deprived of his property and livelihood at the hands of another without any recourse whatsoever.

Basis for Federal Jurisdiction

This action came within the jurisdiction of the Federal Court in the first instance by virtue of diversity of citizenship and by virtue of the fact that the amount in controversy exceeded the sum of $10,000.

Reasons for Granting the Writ

The position of the petitioner is succinctly stated by the experienced and able Judge Bryan in the dissenting opinion in this case:

> "Although he was forced to abandon his business by the defendant's infiltration of his store with noxious odors, as the majority finds, yet the plaintiff is denied

damages. The premise of the holding is that until the creator of a nuisance is notified that his acts are resulting in injury to another, no right of action accrues to the latter, no matter how grievous the intrusion. The consequences of this view are amazing. One's property may be invaded by offensive gases from a source not discoverable for weeks, months or even years, and in the end the property rendered uninhabitable or otherwise valueless, but the injury is not actionable! I cannot believe this is the law in North Carolina."

The majority of the Court of Appeals for the Fourth Circuit has relied for the most part on the Restatement of Torts for its decision that petitioner is not entitled to recover because he did not notify respondent that it was causing the damages. The fact that respondent had known for a number of years that it was blasting formaldehyde into the air around plaintiff's store was accorded no significance by the Court. The Restatement of Torts represents an attempt to condense into a few words and with convenient verbiage an extensive area of the law of any state. The Court relies to some extent on the case of *Morgan* vs. *High Penn Oil Company,* 238 NC 185, 77 S.E. 2d 682, notes that the Restatement of Torts is cited with approval by the North Carolina Court in that case, concludes that the expression of the Restatement is the law of the State and that the facts presented by the petitioner do not meet the test.

It is true that the Supreme Court of North Carolina noted the Restatement of Torts in its decision. However, an analysis of the case shows that the reference to the Restatement amounted to no more than a broad and academic generalization. Indeed, in the same opinion the North Carolina Court used other language which is significantly in conflict with the interpretation placed by the Court of Appeals not only on the Restatement but also on the Law

of North Carolina. For example, the North Carolina Court stated in the course of the opinion as follows:

> "Much confusion exists in respect to the legal basis of liability in the law of private nuisance because of the deplorable tendency of the courts to call everything a nuisance, and let it go at that. . . . The confusion on this score vanishes in large part, however, when proper heed is paid to the sound propositions that private nuisance is a field of tort liability rather than a single type of tortious conduct; that the feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that any substantial nontrespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance; *that the invasion which subjects a person to liability for private nuisance may be either intentional or unintentional.* . . . (Emphasis added).

And further, the Supreme Court of North Carolina approved the language of Justice Cordozo:

> "Nuisance as a concept of the law has more meanings than one. The primary meaning does not involve the element of negligence as one of its essential factors. One acts sometimes at one's peril. In such circumstances, the duty to desist is absolute whenever conduct, if persisted in, brings damage to another. Illustrations are abundant. *One who emits noxious fumes or gases day by day in the running of his factory may be liable to his neighbor though he has taken all available precautions. He is not to do such things at all, whether he is negligent or careful.*" (Emphasis added).

In our pursuit of petitioner's rights in this case, extensive research has failed to produce one single case where it has been held by the North Carolina Court that the tort-feasor must intend his specific invasion of another's property in order to be required to respond in damages to the injured party. In many cases, it has been obvious that the defendant intended to do the acts which resulted in the invasion. In these cases, the Supreme Court of North Carolina has failed to even mention a requirement of further intention.

For example, in *Gray* vs. *High Point,* 203 NC 756, S.E. 166, 911 (1932), the city constructed a sewage disposal plant near the plaintiff's property which emitted noxious odors. It seemed obvious that everyone knew the sewage plant was emitting noxious odors. Therefore, whether or not the city had notice that the noxious odors were entering the plaintiff's property nearby was not a point of consideration. The city's intent to cause the odor in the general vicinity was sufficiently adequate to entitle the plaintiff to recover damages. In line with the Law of North Carolina, *the sole question for the jury in that case was whether the odors damaged the plaintiff's property and to what extent.* In this case, the District Court has found that the defendant knew it was emitting noxious odors, that these odors damaged the petitioner and that such damages were substantial. There is no difference between a city's sewage plant emitting odors to the knowledge of the city and the Masonite plant emitting formaldehyde to the knowledge of Masonite.

The *Gray* case is merely representative of a long line of decisions in North Carolina. The case of *Aydlett* vs. *Carolina By-Products Company,* 215 NC 700, S.E. 2d 881 (1939) is another example. Similar facts were involved in that odors from defendant's plant caused damage to plaintiff's property located nearby. This case illustrates the fact that knowledge of the particular invasion is not a matter of

consequence in North Carolina. There the defendant denied at all stages that it had done anything to cause any damage. Again, the sole question for the jury in that case was whether the defendant emitted noxious odors, whether or not those odors damaged the plaintiff and to what extent.

Another case in point is *Glace* vs. *Town of Pilot Mountain*, 265 NC 181, 143 S.E. 2d 78 (1965). Again, this case allowed the property owner to recover for damages to his property resulting from noxious odors. The Court of Appeals has cited this case as authority for its position by reason of the fact that the property owner complained to the defendant of the noxious odors. However, there is no suggestion in the opinion that this notice was a requisite of recovery. It is noted that the sole question presented to the jury was again the question of damages.

The statement of Justice Cardozo quoted above and approved in the *High Penn Oil Company* case is the law of North Carolina. The principle is set further in the case of *Watts* vs. *Pama Manufacturing Company*, 256 NC 611, 124 S.E. 2d 809 (1960). As Judge Bryan has written in his dissenting opinion in this case, recovery in that case was allowed on the Cardozo thesis.

We recognize the fact that this case does not present one of the more monumental problems ordinarily handled by the Supreme Court of the United States. However, it does present a case which the Circuit Court has decided in direct conflict with the laws of the State. Equally as important, it is simple justice that a property owner should be compensated where his property is taken and his livelihood is destroyed at the hand of another for no other purpose than allowing the other party to further its own business.

Conclusion

For the reasons set forth above, we respectfully request the Supreme Court to grant this Petition for a Writ of Certiorari.

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OCTOBER TERM, 1966

No. 961

MAX WRIGHT, T/A Wright's Grocery; *Petitioner,*

v.

MASONITE CORPORATION, *Respondent*

APPENDIX TO PETITION

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, WINSTON-SALEM DIVISION

No. C-99-WS-63

MAX WRIGHT, *Plaintiff*,

v.

MASONITE CORPORATION, *Defendant*.

Norwood Robinson and W. F. Maready, of Winston-Salem, North Carolina, for the Plaintiff.

Arthur O. Cooke, of Greensboro, North Carolina, and Russell VanLandingham, of Thomasville, North Carolina, for the Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

EDWIN M. STANLEY, Chief Judge.

This is an action by the plaintiff, a citizen and resident of Davidson County, North Carolina, against the defendant, a Delaware corporation with its principal office in Chicago, Illinois, to recover damages to his person and property by reason of an alleged nuisance created by the defendant.

The case was tried by the Court without a jury. At the conclusion of the trial the parties were afforded an opportunity to file requests for findings of fact and conclusions of law and briefs in support of their respective positions. The requests for findings of fact and conclusions of law and briefs of the parties having been received, the Court, after considering the pleadings and evidence, including exhibits and stipulations filed, and briefs and oral argument of counsel, now makes and files herein its Findings of Fact and Conclusions of Law, separately stated:

Findings of Fact

1. The plaintiff is a citizen and resident of Davidson County, North Carolina.

2. The defendant is a Delaware corporation with its principal office in Chicago, Illinois, and operates a finishing plant in Davidson County, North Carolina.

3. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

4. For approximately 17 years prior to February 4, 1963, the plaintiff operated a small food supermarket at the southeast corner of the intersection of Julian Avenue and Carolina Avenue in Thomasville, North Carolina. At this intersection, Julian Avenue runs north and south and Carolina Avenue runs east and west.

5. From 1960 until the business was closed on February 4, 1963, plaintiff's grocery store was a one-story brick and solite block building 60 feet in width and 40 feet in depth. The front of the building was on Julian Avenue and faced west. Along the rear wall of the structure were four small casement windows, each approximately 12 inches by 18 inches. Access to the building was through doors on the front or west side. The distance from the floor to the ceiling of the store was 8 feet and 9 inches.

6. The plaintiff's supermarket included a freezer for the display and sale of frozen vegetables and other groceries. It also included a meat market, an ice cream freezer and meat cooler. Plaintiff sold a general line of groceries in the store as well as some items of drygoods.

7. The structure in which plaintiff operated his supermarket was heated by means of a suspended gas-fired heating unit located at a point approximately 25 feet from the south wall and about four feet from the east wall of the building. The unit did not draw fresh air into the store, but was provided with means for expelling exhausted air from within the building to the outside. Air within the building was constantly recirculated through the heating unit.

8. From 1954 until the summer of 1962, the defendant operated a finishing plant located on the north side of

Carolina Avenue, and diagonally across Carolina Avenue from the plaintiff's store. In the summer of 1962, the defendant moved its finishing operations to a building located on the south side of Carolina Avenue and approximately 178 feet east of plaintiff's store. After it was moved, defendant's finishing plant was from 50 to 60 feet nearer plaintiff's store than when formerly located on the north side of Carolina Avenue. The area in which the plaintiff's store and defendant's finishing plant were located was a semi-residential district in the City of Thomasville, North Carolina, and the businesses operated by the plaintiff and the defendant were the only businesses located in the immediate area.

9. During the latter part of 1962 and the early part of 1963, there were two residences located between the plaintiff's store and the defendant's finishing plant. The first of these residences was 63 feet from plaintiff's store, and directly in line between the store and defendant's finishing plant. This residence was a small, frame structure measuring 25 feet in width and 46 feet in depth. Adjacent to and about 35 feet east of the first residence was a second residence, likewise a small, frame one-story building measuring 29 feet in width and 46 feet in depth. The east wall of the latter residence was located about 20 feet from the west wall of the defendant's finishing plant. Other dwellings were located across the street from plaintiff's store.

10. In the operation of its finishing plant, unfinished masonite boards were shipped to the defendant in Thomasville and then cut and finished to the specifications and orders of customers. The finished products were used primarily in the furniture industry. Located in the defendant's finishing room were facilities for applying finishing materials to its products. This was done in two ways. One method was through the use of a roll coat process, and the second method was the application of finishing materials by use of a spray gun within a spray booth.

11. Prior to July of 1962, the finishing room of the defendant had several exhaust fans on the roof which discharged fumes from within the finishing room into the atmosphere. These exhaust fans served to discharge fumes

from the apparatus used in the roll coat process as well as fumes from the spray booth operation. Both finishing methods had been in use by the defendant for several years prior to July of 1962 when the finishing room was removed to the new building located across Carolina Avenue.

12. When the defendant moved its finishing room from the north to the south side of Carolina Avenue, the equipment which had been used in the finishing process for both the roll coat method and the spray booth method was removed from the old building. The finishing operation was set up along the west side of the new building, the side nearest the plaintiff's store. In transferring the spray booth operation, the booth itself, along with its two exhaust fans and the spray guns, was transferred from the old building to the new building, and the spray booth operation in the new building was identical with the spray booth operation which had been conducted in the old building. The conveyor system used in the roll coat process was likewise carried to and installed in the new building. This operation remained the same, with the exception of the addition of air blown along the conveyor lines by means of a make-up air unit installed on the roof of the new building.

13. The materials finished by the roll coat process utilized a conveyor system. The finishing materials were applied to the masonite boards as they passed along a conveyor belt. The boards then passed over two separate banks of infrared lamps, each containing 40 to 50 such lamps. Each of the lamps was approximately six inches in diameter, and the masonite boards with the freshly applied finishing material passed over the two banks of lamps at a distance of approximately 10 inches. The purpose of the lamps was to apply heat to the finishing material and thereby accelerate the drying process. The spray booth, a three-sided booth approximately eight feet long and four feet deep, was used for the application of a particular finish on masonite boards. The finishing process in the spray booth involved the application of varnishes and lacquers to masonite boards by use of a spray gun, which atomized the varnishes or lacquers into a fine mist. In comparison with the conveyor system, the spray booth required three or

four times as much lacquer or varnish to finish masonite boards because of the fact that the majority of the material used in the spray booth escaped into the air, and was thus taken out of the spray booth and the building by means of the exhaust system.

14. On or about December 1, 1962, the defendant began using a "make-up" air unit in its finishing plant. Generally, the function of the make-up air unit was to draw in filtered air from the outside of the building, and then exhaust same out of the building by eight exhaust fans located on the roof of the finishing room and leading to exhaust vents on top of the building. The air drawn into the building in December of 1962, and in January and February of 1963, was heated before reaching the finishing process. Upon reaching the finishing process, the heated air was passed over the varnishes and lacquers applied to the masonite boards on the conveyor system. The purpose of this was to accelerate the drying of lacquers and varnishes. A part of the air also came through the spray booth and was exhausted out of the top of the building by two of the exhaust fans located in the top of the spray booth. None of the air was filtered or otherwise purified before being exhausted into the air from the eight exhaust fans on top of the building. One of the purposes for the make-up air unit was to warm the outside air during cold weather prior to the time it was brought into the finishing room.

15. At all times pertinent, the defendant used two general classifications of finishing materials in its Thomasville plant. One type of finishing material contained no urea-formaldehyde, or formaldehyde in any other form. This type of finishing material was a nonsynthetic lacquer or varnish and accounted for about 95 per cent of the masonite boards finished at the defendant's plant. This natural lacquer or varnish without urea-formaldehyde was used in finishing boards by the roll coat process. A second classification of lacquers and varnishes was that known in the industry as synthetic lacquers or varnishes, and contained a urea-formaldehyde resin. The use of synthetic lacquers and varnishes accounted for about five per cent of the production of the defendant, and was the material used exclu-

sively in the spray booth. These synthetic lacquers and varnishes had been used by the defendant over a period of several years. A urea-formaldehyde resin is produced by combining urea and formaldehyde. This combination is then mixed with other chemicals and compounds in various quantities and proportions to produce what is known in the trade as a synthetic lacquer or a synthetic varnish. In the manufacturing process, the urea and formaldehyde do not always result in a perfect combination of the two chemicals, and the result in the finished product in such case is a very small percentage of "free" formaldehyde. Further, when a catalyst, such as heat or certain acids, is applied to a synthetic lacquer or varnish containing urea-formaldehyde resin, the result is the chemical breakdown of the urea-formaldehyde compound. This breakdown process, among other things, produces formaldehyde gas and ammonia. Where such breakdown occurs in a lacquer or varnish containing a urea-formaldehyde resin, the odor of formaldehyde is given off as well as the characteristic odor from ordinary varnishes and lacquers. However, products finished by the defendant by the use of synthetic lacquers and varnishes were not subjected to heat beyond that in the building to facilitate the drying process, but the synthetic materials used in the spray booth were mixed with an acid catalyst before they were applied.

16. Prior to December of 1962, no odor problem of consequence was present in the vicinity of the defendant's finishing plant, and none of the residents of the area had ever made any complaint to the defendant concerning any condition created by the operation of its business.

17. Beginning the latter part of December of 1962, the plaintiff noticed an odor in and around his store similar to that of varnish or lacquer. In early January, 1963, the odor became more pronounced, pungent and penetrating, and was later identified as being the odor of formaldehyde gas. These strong, noxious odors, both inside and outside the plaintiff's store, continued until about February 20, 1963, after which they were rarely noticeable in the atmosphere.

18. During the early part of January of 1963, customers

of the plaintiff began returning food that had been purchased at his store, complaining that it had a bitter or "off" taste. At first such foods consisted principally of eggs and meat products. When the return of groceries persisted and accelerated, plaintiff requested the assistance of State and local health officials in an attempt to find the source of the problem. At the suggestion and advice of the health officers, plaintiff made various efforts to determine the source of the odors, which efforts included washing out the meat counter on several occasions and disposing of the meat contained therein, and the employment of experts to check the heating and cooling systems in the store. These efforts failed to locate the source of the trouble.

19. By the end of January of 1963, the odor in the store had permeated practically every item of food, except those items enclosed in glass or tin cans. The bitter or "off" taste first noticed in eggs and meat products was finally detected in sealed cigarette packages, oatmeal and bread containers, groceries contained in plastic or paper containers, and practically every other item, except, as earlier noted, canned goods and goods sealed in glass. Because of the problem created by the noxious and penetrating odors, the plaintiff closed his meat market on January 31, 1963, and his entire store on February 4, 1963. The store has not since reopened, and at the time of the trial, most of the groceries, including the canned goods, remained in the store.

20. During the week of February 11, 1963, George Davis, an expert chemist with many years of experience with formaldehyde and its chemical properties, tested various air samples in the plaintiff's store and surrounding atmosphere. Four different tests, all utilizing recognized procedures, showed the presence of substantial quantities of formaldehyde gas, both inside and outside the store, during the week the tests were run. The test made on the outside of the store showed comparable amounts of formaldehyde gas as the test taken inside of the store. The odors which were present both inside and outside the store during the week of February 11, 1963, were the same as the

odors detected by the plaintiff since the early part of January. Although the odor was described by some lay witnesses as being similar to that of varnish and lacquer, it is found that the odor was caused in part by formaldehyde gas.

21. Other investigations were made by State and Federal health officials. Air samples, taken both inside and outside the plaintiff's store, were collected and analyzed by other firms and governmental agencies during the month of February of 1963. In collecting the air samples, methods different from that employed by Mr. Davis were used. There is no evidence that any of the methods employed to collect air samples were not proper. Some of the tests failed to reveal the presence of formaldehyde in the atmosphere, while others taken from inside of the plaintiff's store revealed the presence of formaldehyde, but in a smaller quantity than the tests conducted by Mr. Davis. Tests were also made of lighter fluid found in the plaintiff's store. These tubes of lighter fluid were attached to charcoal bags and located near the gas heater used to heat the store. There was some evidence that the lighter fluid, when heated to a certain point, could result in decomposition which could produce a formaldehyde gas, and some evidence that the heat produced by the gas-fired heater in the store was of sufficient intensity to decompose the lighter fluid. However, from all the evidence, the Court is convinced, and finds as a fact, that the odor problem experienced by the plaintiff during the months of January and February of 1963 came from a source outside the store. Significant in this regard is the fact that food samples placed in a number of residences in the area by the health authorities were found to contain the same bitter or "off" taste as the food purchased from the plaintiff's store, and the further fact that the evidence is overwhelming to the effect that the same odor detected inside the store was also detected outside the store. Additionally, the method used by Mr. Davis in collecting and testing air samples, both inside and outside of the store, all of which disclosed substantial quantities of formaldehyde, was not criticized or discredited by any of the wit-

nesses. This positive testimony offered by Mr. Davis is far more convincing than the negative testimony offered by some of the other witnesses. And finally, the defendant fell woefully short in its effort to establish that the presence of the lighter fiuid, or any other substance or condition inside the store, produced the noxious and penetrating odors that compelled the plaintiff to close his store and abandon his business.

22. Formaldehyde gas produces a very pungent, penetrating and noxious odor. Formaldehyde itself is a very volatile and active chemical. A significant characteristic of formaldehyde gas is that it will penetrate almost every container found in a grocery store, except tin and glass. The penetration of meat and other groceries by such gas will render the food inedible and unfit for human consumption. It is found that the formaldehyde gas encountered in plaintiff's store was in sufficient quantities to permeate and render inedible most grocery items not sealed in glass or in tin cans.

23. It is not disputed that during the month of December of 1962, and the months of January and February of 1963, the defendant purchased and used quantities of synthetic lacquers and varnishes containing urea-formaldehyde in its spray booth operation. While there were a number of furniture factories in the Thomasville area using the same type of lacquers and vanishes as those used by the defendant in its spray booth, and there is one company in the area that manufactures synthetic lacquers and varnishes, there is no evidence that any business in the vicinity of plaintiff's store, other than the business of the defendant, uses such lacquers and varnishes. As earlier noted, the synthetic materials used by the defendant during the period in question were mixed with an acid catalyst which had the same effect on the materials as heat. Thus, the liquid catalyst applied to the synthetic materials used in the spray booth would cause the urea-formaldehyde resin in the materials to break down and give off formaldehyde gas, which was exhausted from the spray booth and into the atmosphere without filtering. Further, during the drying process, the masonite boards

finished with the material containing urea-formaldehyde resin would give off the odor of formaldehyde, as well as other characteristic odors, even at room temperature. These odors were likewise exhausted from the finishing room through the exhaust vents located on the top of the building.

24. The formaldehyde gases and other odors given off by the lacquers and varnishes used in the defendant's plant were exhausted from the plant for the purpose of removing the undesirable odors and fumes from the finishing room. One characteristic of formaldehyde gas is that it tends to adhere to itself, and when the humidity is high the gas tends to stay close to the ground rather than rise in the air. Accordingly, the plaintiff and other people in the immediate vicinity of the defendant's plant were particularly affected by the gas fumes at times when the humidity was high. On days when the humidity was high and the wind was blowing from the direction of the defendant's plant toward the plaintiff's store, the odors in and near the plaintiff's store were particularly offensive.

25. From all the evidence, it is found that from the latter part of December of 1962, and continuing until on or about February 18, 1963, the defendant's plant discharged formaldehyde gases, and other gases with the odor of varnishes and lacquers, into the atmosphere in substantial quantities. It is further found that the formaldehyde and other gases discharged by the defendant's plant entered the plaintiff's place of business and permeated the groceries therein, resulting in the plaintiff having to close his store on February 4, 1963.

26. In addition to the damages caused to his business by the discharge of the formaldehyde and other gases, the plaintiff claims that he developed bronchitis in February of 1963, and that this condition also resulted from inhaling the gases discharged from the defendant's plant. While the plaintiff was undoubtedly ill for about three months during the spring of 1963, he has failed to sustain his allegation that his illness resulted from any fumes discharged from the defendant's plant. The plaintiff offered the testimony of Dr. C. O. Plyler, Jr., who has been engaged in the general

practice of medicine in the Thomasville area for more than seven years, who stated that he saw the plaintiff on February 8, 1963, and thereafter over a period of about three months, and that he was found to have bronchitis. Dr. Plyler expressed the opinion that plaintiff's condition could have resulted from the inhalation of formaldehyde fumes. However, he further testified, with some reluctance, that he treated plaintiff a year earlier for a condition diagnosed as acute bronchitis. The treatment and period of disability in 1962 were substantially the same as the treatment and period of disability in 1963. Consequently, the Court finds that there is no relationship between the fumes, gases and odors discharged from the defendant's plant during the early part of 1963 and the illness suffered by the plaintiff during the same period.

27. The evidence with respect to the damage sustained by the plaintiff as the result of being forced to close his business is rather indefinite. For the year 1962, the net profit realized by the plaintiff from the operation of his grocery store was about $3,200.00, and had been the same for several years prior thereto. The store building was owned by the plaintiff's father, and the plaintiff paid no rent for the use of the building. If a reasonable rent had been paid, the profit from the operation of the business would have been that much less. As of December 31, 1962, the plaintiff had an inventory of salable merchandise of about $7,774.00. This inventory did not include the refrigeration equipment, cooler boxes, counters, shelving, and other equipment used in the operation of the store, on which no valuation was placed. The plaintiff testified that his business was worth about $20,000.00 before it was closed and about $1,500.00 after it was closed. He further estimated that he destroyed merchandise having a value of about $1,000.00 during the period he encountered the odor problem. After carefully considering all of the evidence bearing on the issue of damage, it is found that the plaintiff suffered a loss and damage as a direct and proximate result of the odors and gases which entered his store from the defendant's building in the amount of $12,000.00.

28. Plaintiff did not initially associate the odor in his

store with any activity of the defendant in the operation of its plant. He did not notify the defendant of his difficulty until February 1, 1963, three days before he closed his store, when representatives from the local health department went to the defendant's plant and talked with its assistant manager. The defendant knew for a number of years that it was discharging the fumes from its finishing plant, including fumes from the synthetic materials used in its spray booth containing urea-formaldehyde, into the atmosphere. The make-up air unit installed in the fall of 1962, and placed in operation during the early part of December of that year, undoubtedly exhausted the fumes with greater force and dissipated them over a wider area than before, but it did not result in the exhaustion of any fumes that had not been previously exhausted into the atmosphere. As earlier noted, the odor problem started during the latter part of December of 1962, and ceased during the latter part of February of 1963, without the defendant making any material changes in the method employed in finishing its masonite boards, or in the lacquers of varnishes used in the finishing process, except the installation of the make-up air unit. While the evidence is overwhelming that the odor problem at the plaintiff's store emanated from the defendant's plant, and such has been found as a fact, no suggestion has been made, with the possible exception of the presence of unusual atmospheric conditions, as to why the odor problem existed during this particular period, and not earlier or later. The plaintiff argues that the defendant was derelict in not filtering the fumes from its finishing plant before discharging them into the atmosphere, but there was no substantial evidence that any filtering method is known to or employed by other businesses where similar materials are used and similar fumes and gases are exhausted. There was nothing to indicate to the defendant the possibility of creating a nuisance of the type described by the plaintiff.

Discussion

The question for decision is whether the facts as found impose liability upon the defendant for the damages sustained by the plaintiff. This being a diversity suit, we must look to the substantive law of the State of North Carolina in making this determination.

It should first be noted that the plaintiff does not charge the defendant with the negligent operation of its business, but rather charges a conduct amounting to a nuisance. Negligence and nuisance are distinct fields of tort liability. While the same act may constitute negligence and also give rise to a private nuisance, a private nuisance may be created or maintained without negligence. As an examination of the authorities will reveal, most private nuisances are created or maintained, and redressed by the court, without proof of negligence. *Watts* v. *Pama Manufacturing Company,* 256 N. C. 611, 124 S. E. 2d 809 (1962).

One of the earlier North Carolina cases dealing with the liability imposed upon the operator of a private business with respect to the rights of others in the vicinity is *King* v. *Ward, et al,* 207 N.C. 782, 178 S.E. 577 (1935). There the court stated:

> ". . . a legitimate and proper business enterprise located in a town, which enterprise is not in itself a nuisance, is subject to no liability to adjacent property owners or others in the vicinity for the ordinary, careful, and reasonable operation of the business. It is the negligent and unreasonable operation and maintenance that produces the nuisance, and the nuisance thus created imposes liability."

In the same case, the Court approved the following jury instructions given by the trial judge:

> ". . . The law does not recognize every business or use of property as a nuisance that imparts a degree of impurity to the air, for if such were the case towns could not be built or life in compact communities tolerated, and even the ordinary uses of property would

certainly be interfered with, for in proportion to the sparseness or compactness of a population the air is pure or impure. One cannot reasonably occupy a dwelling house or place of business and use any kind of fuel therein, without imparting more or less of impurity to the atmosphere, and in proportion as these are aggregated in one locality, are these impurities increased, but as these are among the common necessities of life, and absolutely indispensable to its reasonable enjoyment, the law does not recognize them as being actionable interference with the rights of others, unless exercised in an unreasonable manner so as to inflict injury on another unnecessarily.''

Perhaps the two leading cases in North Carolina dealing with the law of nuisance are *Morgan* v. *High Penn Oil Co., et al,* 238 N. C. 185, 77 S.E. 2d 682 (1953), and *Watts* v. *Pama Manufacturing Company,* 256 N. C. 611, 124 S.E. 2d 809 (1962).

In the *Morgan* case, the defendant was charged with constructing and operating an oil refinery in such a manner as to constitute a nuisance in that it substantially polluted the atmosphere of the entire neighborhood and thus injuriously affected the plaintiffs in the use and enjoyment of their land. Significantly, the plaintiffs had advised the defendant of the nuisance, and had demanded that it be abated, and the defendant had refused to do so, before the commencement of the action. In discussing the essential elements of an actionable private nuisance, the court stated:

"... private nuisances may be classified as nuisances *per se* or at law, and nuisances *per accidens* or in fact. A nuisance *per se* or at law is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. ... Nuisances *per accidens* or in fact are those which become nuisances by reason of their location, or by reason of the manner in which they are constructed, maintained, or operated. ...

"Much confusion exists in respect to the legal basis of liability in the law of private nuisance because of

the deplorable tendency of the courts to call everything a nuisance, and let it go at that. . . . The confusion on this score vanishes in large part, however, when proper heed is paid to the sound propositions that private nuisance is a field of tort liability rather than a single type of tortious conduct; that the feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that any substantial nontrespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance; that the invasion which subjects a person to liability for private nuisance may be either *intentional or unintentional;* that a person is subject to liability for an *intentional* invasion when his conduct is unreasonable under the circumstances of the particular case; and that a person is subject to liability for an *unintentional* invasion when his conduct is *negligent, reckless or ultrahazardous.* . . .

"An invasion of another's interest in the use and enjoyment of land is *intentional* in the law of private nuisance when the person whose conduct is in question as a basis for liability *acts for the purpose of causing it, or knows that it is resulting from his conduct, or knows that it is substantially certain to result from his conduct.* . . . A person who *intentionally* creates or maintains a private nuisance is liable for the resulting injury to others regardless of the degree of care or skill exercised by him to avoid such injury. . . ." (Emphasis supplied)

The *Watts* case involved the operation of a textile plant in such a manner as to cause the home of the plaintiffs to vibrate and shake, thus causing great annoyance, inconvenience and damage to the plaintiffs. Here again the plaintiffs demanded that the defendant cease the injurious operation, and the defendant refused to do so, before the institution of the action. It was first observed that in order for the plaintiffs to make out a *prima facie* case on the nuisance issue they must present evidence tending to show

(1) that the defendant operated its mill in such a manner as to produce unreasonable noise and vibration under the circumstances existing, and (2) that because of such unreasonable noise and vibration, there was substantial injury and loss to the plaintiffs' property. The Court then went on to state:

> "The mere fact that an invasion of another's interest in the use and enjoyment of land is intentional does not mean that it is unreasonable. Fundamentally, the unreasonableness of intentional invasion is a problem of relative values to be determined by the jury in the light of the circumstances of the case. The question is not whether a reasonable person in plaintiffs' or defendant's position would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Regard must be had not only for the interests of the person harmed but also for the interests of the defendant, and for the interests of the community. . . . What is reasonable in one locality and in one set of circumstances may be unreasonable in another. . . . No single factor is decisive; all the circumstances in the particular case must be considered."

The Court further held, in harmony with the principles enunciated in the *Watts* case, that a person is subject to liability for an unintentional invasion of the property of another only "when his conduct is negligent, reckless or ultrahazardous."

In *E. Rauh & Sons Fertilizer Co.* v. *Shreffler*, 6 Cir., 139 F. 2d 38 (1943), the defendant was charged with emitting sulphur dioxide from its fertilizer plant, thereby causing injury to the gladioli crop of the plaintiff. The evidence disclosed that normally the noxious fumes from the defendant's plant were exhausted by a fan which drew the fumes through a flume and water spray that removed most of the soluble gases, but that on the date in question the fan in the defendant's plant had broken down and the water in the spray had been turned off. The Court observed that an inference reasonably to be drawn from this evidence was

that one of the purposes of the fan, flume and water conveyor, if not the most important purpose, was to render the gases emanating from the fertilizer plant harmless to vegetable or other property in the surrounding area. Since the defendant continued to operate its fertilizer plant, notwithstanding the failure of the filtering assembly, it was held that the jury was entitled to conclude that the injury was foreseeable and preventable, and thus in the eyes of the law, intentional, without regard to whether the apparatus itself failed because of accident or because of lack of care or negligence. Under such circumstances, it was concluded that if the injury to the plaintiff flowed from the continued operation of the defendant's plant without safeguards, the operation was deliberate.

Under all the authorities brought to the attention of the Court, including those referred to above, it is firmly established that there is no liability for the unintentional invasion of the lands of another unless the invasion is caused by negligent, reckless or ultrahazardous conduct. For example, in *Restatement of the Law of Torts,* § 822(m), it is stated:

> "There is no general rule of law that one acts at his peril in respect to interference with another's use or enjoyment of his land, and therefore when such interferences are purely accidental the actor is not liable for causing them. It is only when unintentional invasions are caused by another's conduct which is negligent, reckless or ultrahazardous that the law subjects the actor to the liability."

And in Section 825(a) of the same treatise, it is stated:

> "It is the knowledge which the actor has at the time he acts or fails to act that determines whether the invasion which results from his conduct is intentional or unintentional. It is not enough to make an invasion intentional that the actor realizes or should realize that his conduct involves a serious risk or likelihood of causing such an invasion. He must either act for the purpose of causing it or know that it is resulting or is substantially certain to result from his conduct."

With the above principles of law in mind, we turn now to a consideration of the conduct of the defendant which resulted in the damages sustained by the plaintiff. From 1954 until the summer of 1962, the defendant operated its finishing plant in the vicinity of the plaintiff's store. During this entire period, the defendant used synthetic varnishes and lacquers containing urea-formaldehyde in finishing small quantities of its products, and exhausted the fumes from the roof of its building. When the defendant moved its finishing plant across Carolina Avenue in the summer of 1962, it continued its finishing operations in the identical manner as these operations had earlier been carried on. At no time did the defendant receive any complaint from the plaintiff or any residents of the area with respect to the fumes and odors being exhausted from its plant. The only change whatever which the defendant made in the operation of its finishing plant, including the materials used in its finishing process, after the removal, was the installation of a make-up air unit during the latter part of 1962. This unit did not exhaust any fumes from the building that had not been exhausted earlier, and the only effect the unit had, particularly insofar as the plaintiff and the other residents of the area were concerned, was to dissipate the fumes over a wider area. There was no credible evidence that the method employed by the defendant to finish its products, including the method used to exhaust fumes from its finishing plant, both before and after the installation of the make-up air unit, was not a method commonly used in the trade. The defendant was operating a legitimate business and, so far as is disclosed by the evidence, was operating its business in strict compliance with all applicable municipal and other governmental rules and regulations. The plaintiff did not associate the difficulties he was experiencing in his store with the activities of the defendant, and the defendant had no knowledge of the plaintiff's odor problems until February 1, 1963, three days before the plaintiff closed his store. The presence of formaldehyde gas in the atmosphere was not discovered until the week of February 11, 1963, more than a week after the plaintiff had discontinued his business.

If the defendant was creating a nuisance, there was never any request that the nuisance be abated. No odor problem has been experienced in the community since about two weeks after the plaintiff closed his store, and the defendant has at all times continued to operate its business in the same manner as before.

Any nuisance created by the defendant must be classified as unintentional. There is no evidence to support a finding that the defendant operated its business in an unreasonable manner, or that its conduct was negligent, reckless or ultrahazardous. The defendant had no way of knowing or being substantially certain that the method employed to finish its products, and to exhaust fumes from its plant, would cause harm to the plaintiff or others in the area. While it has been found that the urea-formaldehyde fumes exhausted from the defendant's plant resulted in the plaintiff having to close his business and suffer a substantial monetary loss, this unfortunate occurrence was not foreseeable by the defendant and was purely accidental. Under such circumstances, no legal liability attaches to the defendant for the damages sustained by the plaintiff.

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter.

2. The defendant was not guilty of any intentional, unreasonable, negligent, reckless or ultrahazardous conduct which resulted in the creation of the nuisance complained of.

3. The plaintiff is entitled to recover nothing of the defendant, and the complaint should be dismissed with prejudice.

A judgment will be entered accordingly.

(s) Edwin M. Stanley,
United States District Judge.

January 8, 1965.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9940

MAX WRIGHT, T/A Wright's Grocery, *Appellant*,

versus

MASONITE CORPORATION, *Appellee*.

No. 9941

MAX WRIGHT, T/A Wright's Grocery, Appellee,

versus

MASONITE CORPORATE, *Appellant*.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT WINSTON-SALEM. EDWIN M. STANLEY, DISTRICT JUDGE.

(Argued June 29, 1965. Decided October 19, 1966.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF and BRYAN, Circuit Judges.

W. F. Maready and J. Robert Elster (Norwood Robinson and Hudson, Ferrell, Petree, Stockton, Stockton & Robinson on brief) for Appellant in No. 9940 and Appellee in No. 9941, and Arthur O. Cooke (Russell Van Landingham and Cooke & Cooke on brief) for Appellee in No. 9940 and Appellant in No. 9941.

HAYNSWORTH, Chief Judge:

We affirm the District Court's dismissal of this action in which the plaintiff sought damages for loss of a stock of goods in his grocery store as a result of contamination by noxious gases, for the invasion was not intentional within the requirements of the North Carolina rule.

In the winter of 1963, there was a strong odor of formal-

dehyde gas in the plaintiff's grocery store. A large portion of his stock of goods became infected with the odor. Many items were returned after sale, and the remainder of the infected goods became unsalable. Wright had never before experienced such a loss.

He sought the assistance of a number of governmental agencies whose investigators were unable to detect any formaldehyde gas in the atmosphere outside Wright's store, though it was obviously present within the store. Finally, however, an acquaintance with access to some laboratory facilities took samples of the outside air which, according to tests conducted by him, disclosed the presence of some such gases.

Approximately 200 feet from the plaintiff's store was a building in which the defendant conducted its factory operations. Approximately 5% of its production of masonite board was finished with synthetic lacquers and varnishes. Such lacquers and varnishes contain a urea-formaldehyde resin. In the process of formation of the resin, a very small quantity of free formaldehyde may be left. Moreover, when such a resin is subjected to heat or certain acids it may suffer a chemical breakdown with consequent release of formaldehyde gas and ammonia.

It was the plaintiff's theory that formaldehyde gas was present in the exhaust from the spray booth in which synthetic lacquers and varnishes were applied to some of defendant's products and was the source of the gases which permeated his stock of goods. His initial inference was not an unnatural one, for when he first noticed the obnoxious odor in his store, it seemed to him to resemble the odor of a lacquer or varnish, though the governmental investigators thought the odor in the store unlike that of the defendant's exhaust gases.

Though there was evidence of a source of the contamination inside the store, in the vaporization of lighter fluid leaking from a number of containers stored near a gas-fired heater, and though the odor disappeared shortly after those containers were moved at the suggestion of governmental investigators, the District Court resolved the factual conflict in plaintiff's favor. It found that the defendant's

plant was the source of the offe[illegible]ng gases that caused the harm to the plaintiff's goods. At the same time, the District Court found, on uncontradicted evidence, that the defendant knew nothing of the harm that the plaintiff was suffering until after the event, that it had received no prior complaints from the plaintiff or from anyone else and that others living in the area experienced no similar harm. So far as appears on this record, no one has since suffered any such harm from exhaust gases discharged by the defendant.

On the basis of these findings the District Court concluded that the invasion was not intentional and that the defendant's conduct was not an actionable private nuisance under the laws of North Carolina, which govern us in this diversity case.

Some American states have applied the rule of Rylands v. Fletcher,[1] in noxious gas cases. They are collected in Prosser on Torts, 3rd Edition, at pages 524-6. They include Maryland and South Carolina, in this Circuit, but not North Carolina. The more general rule in the United States confines the *Rylands* v. *Fletcher* doctrine to ultrahazardous activities. This is recognized by Prosser and by the Restatement. Since the North Carolina Supreme Court, in discussing this subject, frequently has cited and paraphrased the Restatement, it provides a particularly useful point of reference.

In the Restatement of Torts, the *Rylands* v. *Fletcher* doctrine, as applied to ultrahazardous activity, is set forth in §§ 519-20. The very different rules governing liability for private nuisances are set forth in Chapter 40, the first section of which is § 822. That section provides that an actor is liable for a nontrespassory invasion of another's interests in land if, in this context,[2] the invasion is both intentional and unreasonable. Under § 825, the invasion

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[1] Fletcher v. Rylands, 1865, 3 H. & C. 774, 159 Eng. Rep. 737, reversed in Fletcher v. Rylands, 1866, L.R. 1 Ex. 265, affirmed in Rylands v. Fletcher, 1868, L.R. 3 H.L. 300.

[2] In other contexts, of course, one may be responsible for unintentional invasions of interests in land resulting from reckless, negligent, or ultrahazardous conduct.

is intentional within the meaning of § 822 only if the actor acts for the purpose of causing the harm or knows that it is resulting or is substantially certain to result from his conduct. Sections 826, et seq., elaborate the rules for application of the concurrent requirement that the actor's conduct be unreasonable.

Morgan v. High Penn Oil Co., 238 N. C. 185, 77 S.E. 2d 682, was a noxious gas case. There was no question that the invasion was intentional within the meaning of Restatement §§ 822 and 825, for it was the result of a persistent discharge of gases after actual notice of the harm they were causing. Nevertheless, the Supreme Court of North Carolina took pains to point out:

> "* * * [A] person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case * * *. See Scope and Introduction Note to Chapter 40, American Law Institute's Restatement of the Law of Torts * * *.
>
> "An invasion of another's interest in the use and enjoyment of land is intentional in the law of private nuisance when the person whose conduct is in question as a basis for liability acts for the purpose of causing it, or knows that it is resulting from his conduct, or knows that it is substantially certain to result from his conduct. Restatement of the Law of Torts, § 825 * * *." (page 689).

Its ultimate conclusion was expressed in the following language:

> "* * * When the complaint is construed as a whole however, it alleges facts which show a private nuisance resulting from an intentional and unreasonable invasion of the plaintiff's interest in the use and enjoyment of their land." (page 690).

The first sentence from the first excerpt from the *Morgan* opinion, quoted above, cannot be construed as meaning the injury is intentional if the actor's conduct is unreasonable. In that case, it was conceded that the harm was

intentional. The action was for an injunction and for damages suffered after notice to the defendant, admittedly received, of the harm the fumes were causing. The Court's language is simply the equivalent of, "though the invasion be intentional within the meaning of the rules contained in Restatement, Torts, Chapter 40, the actor is not liable unless his activity was also unreasonable." That this is so, finds support in the fact that the Court documented its statement by a general citation to the entire introductory note to Chapter 40 of the Restatement. Any doubt about the meaning of the first sentence, however, is dispelled by the fact that, in its very next breath, the opinion defines exactly what is meant by an "intentional invasion." This is done in the very language of Restatement § 825, though without quotations, and is followed, immediately and appropriately, by a citation of that section.

Certainly, the holding in a case in which it was conceded that the invasion was wrought with knowledge of the harm it was causing cannot stand for the proposition that such knowledge is not an essential of the cause of action. When the Court, nevertheless, has gone out of its way to spell out the requirement of knowledge in the language of, and with specific citation to, the Restatement's formulation, a conclusion that North Carolina has rejected those principles is impermissible. Far from intimating that in North Carolina the invasion need not be intentional if the defendant's discharge of noxious gases on its own land can be said to be unreasonable though done with due care and prudence, the Supreme Court of that state has explicity stated that it must be. When the Court has stated the requirement in the language of the Restatement, with appropriate acknowledgment of its source, there is no room for a construction of the opinion as a rejection of of the Restatement's formulation.

Such a construction cannot be founded on the Court's quotation of the Cardozo dictum in McFarlane v. City of Niagara Falls, 247 N.Y. 340, 160 N.E. 391, 57 A.L.R. 1. The quotation follows a statement that one who intentionally creates a private nuisance is liable for the harm it causes regardless of negligence. The quotation lends support to that proposition, the immediate subject of discussion. It cannot

support an inference that in North Carolina, the harm need not be intended, for any such inference is expressly controverted by what the Court had expressly said earlier in the same opinion when explicitly discussing the question of intention.[3] What the Court said when directing itself to the immediate problem cannot be negated by dubious inferences derived from language it employed in discussing a related, but different problem.

The other North Carolina case to which the parties principally look is Watts v. Pama Manufacturing Company, 256 N.C. 611, 124 S.E. 2d 809. It is not a noxious gas case at all. It involved nothing remotely suggestive of ultrahazardous activity. It is, however, an ordinary private nuisance case, as this one is said to be.

In that case, it appears that in 1957 the plaintiff built a house on a lot adjacent to a hosiery mill. He experienced no annoyance from the operation of the hosiery mill, but in 1960 the defendant converted the plant to other uses, installed much heavier machinery and enlarged the air-conditioning system. The almost continuous operation of the new, heavy machinery and enlarged air-conditioning equipment created vibrations which were transmitted to plaintiff's house. He protested, but to no avail. Thereafter, the house sustained substantial vibration damage.

Again, as in *Morgan*, there was no question but that the invasion was intentional. The house sustained the damage when the defendant continued the operation of its new, heavy machinery after notice of the harm it was causing the plaintiff in the use and enjoyment of his house. The fact that the invasion was intentional being conceded, the only question in the case was the reasonableness of the defendant's activity on its land.

That the court focused its attention on the only issue in the case is readily explicable. The court's statement, in the context of that case, that "The question is whether or not the use is unreasonable," was the literal and whole

[3] Even in the Cardozo dictum, there well may be an implicit assumption of intention, because the subject is approached in terms of a duty to desist, a duty which, supposedly, would arise only upon notice that harm was being caused.

truth. It contains no implication of a rejection of the intentional requirement. Nor does the court's general statement that one "is subject to liability for an intentional nontrespassory invasion * * * when his conduct is unreasonable." On the contrary, there was no reason to classify the invasion as intentional unless it was of some significance.

It would have been surprising if the court had addressed itself at large to an issue which the case did not present. Nevertheless, as in *Morgan*, it took pains to define the intentional requirement. It said:

> "An invasion of another's interest in the use and enjoyment of land is intentional in the law of private nuisance when the person, whose conduct is in question as a basis of liability, acts for the purpose of causing it, or knows that it is substantially certain to result from his conduct." (page 813).

That is the language of Restatement § 825. The court thus positively and affirmatively foreclosed a construction of its opinion that in North Carolina one in possession of land may be liable for an unreasonable, though unintended, nontrespassory invasion of another's interest in land resulting from conduct which is neither negligent nor ultrahazardous.[4] Its use, in defining the requirement, of the language of Restatement § 825 leaves no room for speculation that North Carolina imposes no such requirement or that it would not be applied in accordance with the reasonable and fair import of the language used.

The language a court uses, of course, cannot negate its holdings. There is no inconsistency here, however. In *Morgan, Watts* and in every other North Carolina case in this area, which has been brought to our attention, the invasion was clearly intentional.[5]

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[4] The Court also cited Restatement § 822 where it is clearly stated that liability results from a substantial invasion only if it is both intentional and unreasonable.

[5] See Glace v. Town of Pilot Mountain, 265 N.C. 181, 143 S.E.2d 78 (1965); Midgett v. North Carolina State Highway Commission, 260 N.C. 241, 132 S.E.2d 599 (1963); Andrews v. Andrews, 242 N.C. 382, 88 S.E.2d 88 (1955).

North Carolina's Supreme Court, both substantively and verbally, has embraced the Restatement's Chapter 40 formulation and applied those principles in noxious gas cases. The court's language, simply but emphatically, forecloses any suggestion that its embrace has been tentative, reluctant or reserved.

Since, in this diversity case, we are required to apply North Carolina law, as declared by its highest court, we are not at liberty to disregard what it has done and said or, by a process of inference from extracted words not immediately germane, to attribute meanings to its opinions which are in conflict with the plain and unequivocal language that court has used in those same opinions when directly discussing the precise question before us.

Since there was no negligence and the invasion was unintentional within the meaning of the rule applied in North Carolina, the District Court properly concluded there was no private nuisance giving rise to a cause of action for damages.

Affirmed.

ALBERT V. BRYAN, Circuit Judge, dissenting:

Although he was forced to abandon his business by the defendant's infiltration of his store with noxious odors, as the majority finds, yet the plaintiff is denied damages. The premise of the holding is that until the creator of a nuisance is notified that his acts are resulting in injury to another, no right of action accrues to the latter, no matter how grievous the intrusion. The consequences of this view are amazing. One's property may be invaded by offensive gases from a source not discoverable for weeks, months or even years, and in the end the property rendered uninhabitable or otherwise valueless, but the injury is not actionable: I cannot believe this is the law in North Carolina.

The majority seems intent upon deciding this case according to the law of the Restatement of Torts, but that is not our obligation. We are bound by the law according to North Carolina even though it deviates from the Restatement. My analysis of the North Carolina Supreme Court decisions discloses that while the Restatement has been

cited, it has not been slavishly followed. Other authorities have been cited too. With cognizance of them all, the Court has not yet said, as I read the North Carolina opinions, that recovery cannot be allowed in the absence of proof of scienter on the part of the offender.

This element is not made crucial in any North Carolina opinion I can find. The majority argues that knowledge was in fact present in the North Carolina cases, and hence there was no occasion for the Court to discuss it. If this argument be factually correct, then with equal logic it follows that those cases do not hold knowledge to be a sine qua non for recovery.

A private nuisance in North Carolina, and generally, consists of a continuing condition, or recurrent acts, springing from an intentional or negligent use of one's property substantially injuring another in his person or property, through an unprivileged and unreasonable invasion of the latter's utilization of his land.

Such an intrusion on the personal and property rights of another is actionable if the generating acts are intentional, though there be no proof of negligence. On the other hand, if the injuring acts were accidental—devoid of neglect or intent—there can be no recovery. If the conduct is careless or is deliberate, and injuriously entrenches upon the private rights of another, the operation constitutes an actionable private nuisance, no matter how innocent or bona fide it may be. These propositions are, I believe, doctrine in North Carolina.

The District Court's findings established, as the majority concedes, that appellee Masonite was purposely emitting noxious gases, which substantially and unreasonably invaded Wright's property. Thus, his hurt arose from what Masonite did, and *intended to do,* i.e., to expel and rid its plant of unwholesome fumes. True, the expulsion was not negligent, reckless, ultrahazardous or accidental in any sense, and Masonite *did not intend to injure anyone,* but injury there was.

To ascertain whether the acts were intentional, the inquiry is directed in North Carolina, and rightly I think, to the voluntariness of the offending acts. This inquiry does

not pertain to the effect or consequences of the acts. It is not whether the *injury* was intentional; but whether the *causative acts* were intentionally done. The only question in respect to the injury is whether it was substantial and unreasonable.

Precedent in North Carolina, in my appraisal, does not impose as a prerequisite of "intentional" the condition that the guilty offender know he is guilty. It is intentional if his use of his property is deliberate and is an unreasonable use. In comparable circumstances—objectionable gases from a refinery on adjoining land—the Court in Morgan v. High Penn Oil Co., 238 NC 185, 77 SE2d 682 (1953) made these points in a comprehensive commentary:

> "[A] private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor. . . .
>
> * * * * * * *
>
> "[T]he invasion which subjects a person to liability for private nuisance may be either intentional or unintentional; . . . a person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case. . . . (77 SE2d at 689) (Citations omitted.)
>
> * * * * * * *
>
> "When the evidence is interpreted in the light most favorable to the plaintiffs, it suffices to support a finding that in operating the oil refinery the [defendant] intentionally and unreasonably caused noxious gases and odors to escape into the nine acres of the plaintiffs to such a degree as to impair in a substantial manner the plaintiffs' use and enjoyment of their land. This being so, the evidence is ample to establish the existence of an actionable private nuisance, entitling the plaintiffs to recover temporary damages from the [defendant]."

Summarizing, the Court quotes the sententious statement of the late Justice Cardozo:

> "'One who emits noxious fumes or gases day by day in the running of his factory may be liable to his neighbor though he has taken all available precautions. *He is not to do such things at all,* whether he is negligent or careful.' McFarlane v. City of Niagara Falls, 247 NY 340, 160 NE 391, 57 ALR 1." (Id. at 690) (Accent added.)

If this statement was dictum when written, as the majority suggests, it has now been established as a sound proposition in the jurisprudence of North Carolina.

These principles were confirmed in Watts v. Pama Manufacturing Company, 256 NC 611, 124 SE2d 809 (1960)—vibration from a factory—apparently the latest pronouncement by the Supreme Court of North Carolina. Although in both opinions it referred to the Restatement of the Law of Torts, in effect recovery was declared permissible on the Cardozo thesis.

Our Circuit spoke similarly to the question in Norfolk & W. Ry. v. Amicon Fruit Co., 269 Fed. 559, 561-62 (4 Cir. 1920):

> "Defendant built this pipe line on its own land and for its own benefit, acting thereby in a private capacity and without legislative authority. However skillfully the work was done and whatever the diligence since exercised, it must be held responsible, not perhaps for a purely accidental occurrence, but for those injuries to an adjoining owner which actually and repeatedly and as it were inevitably resulted, despite the care with which the pipe line was maintained and used. This is the doctrine of Rylands v. Fletcher, L.R. I Exch. 265, long regarded as a leading case, and of the following. . . ." (Citations omitted.)

To me the law of North Carolina more closely resembles Rylands v. Fletcher than it does the Restatement.

North Carolina does not hold with the theory that the creator of a nuisance is liable only from the time he is caught. The State does not allow him one bite. I would reverse the judgment on appeal, and give judgment on the finding of damages made by the District Court.

Received Nov. 23, 1966, in this office. Clerk, U. S. District Court, Greensboro, N. C.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9940

MAX WRIGHT, T/A Wright's Grocery, Appellant,

vs.

MASONITE CORPORATION, Appellee.

Appeal from the United States District Court for the Middle District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

A true copy, Teste:

MAURICE S. DEAN,
Clerk, U. S. Court of Appeals for the Fourth Circuit.

By MARGARET M. WALTON,
Deputy Clerk.

Cost of Appellee:

Cost of printing briefs and appendices at not exceeding $3.00 per printed page.

Filed Oct. 19, 1966. Maurice S. Dean, Clerk.

Received Nov. 23, 1966, in this office. Clerk, U. S. District Court, Greensboro, N. C.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9941

MAX WRIGHT, T/A Wright's Grocery, Appellee,

vs.

MASONITE CORPORATION, Appellant.

Appeal from the United States District Court for the Middle District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

A true copy, Teste:

MAURICE S. DEAN,
Clerk, U. S. Court of Appeals for the Fourth Circuit.

By MARGARET M. WALTON,
Deputy Clerk.

Costs of Appellee:

Cost of printing brief and appendix at not exceeding $3.00 per printed page.

Filed Oct. 19, 1966. Maurice S. Dean, Clerk.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 961

MAX WRIGHT, Petitioner,

v.

MASONITE CORPORATION, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No.

MAX WRIGHT, Petitioner,

v.

MASONITE CORPORATION, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INTRODUCTORY NOTE

For brevity and convenience, Max Wright, Petitioner, will sometimes be referred to herein as plaintiff and Masonite Corporation, Respondent, will sometimes be referred to herein as defendant. All italics in the text of this brief are supplied unless otherwise noted. Page references to the Appendix to Petition are designated (P-App. p. .....); page references to the original transcript of testimony are designated (T. p. .....).

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of North Carolina is reported at 237 F. Supp. 129 (1965). The opinion of the Court of Appeals of the Fourth Circuit is reported at 368 F. 2d 661.

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1966. The petition for certiorari was filed on January 10, 1967. Jurisdiction of this Court is invoked by Petitioner under 28 U.S.C.A. 2101(c).

QUESTION PRESENTED

The sole question presented to this Court by the petition for certiorari is whether the opinion and decision of the trial court (Stanley, J) as affirmed by the opinion and decision of the Court of Appeals for the Fourth Circuit is in accord with the substantive law of North Carolina.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

There are no statutes, rules, or regulations, either Federal or State, involved in this Petition.

STATEMENT OF THE CASE

The unique character of the facts of this case, including the Findings of Fact made by the trial judge, sets it apart from the usual controversy involving the law of nuisance. The distinctive features of this case were both recognized and relied upon by the trial and appellate courts.

Since legal principles properly find their application only when the facts coincide with the basic concept of law, the unusual circumstances of this case are of prime importance. Respondent respectfully requests this Court to direct attention to the Statement of Facts (supported by transcript references) appearing on pages 2-18, inclusive, in its brief filed in the Court of Appeals.

To the facts as found and relied upon, both the trial and appellate courts below applied the substantive law of the State of North Carolina. Both reached the same conclusion.

The trial court noted in its opinion that defendant had operated its business in the vicinity of plaintiff's store from 1954 until 1962; that during this entire period it used synthetic lacquers containing urea formaldehyde in finishing its products and exhausted the fumes from the roof of its building by means of several exhaust fans. (Actual distance from plaintiff's store approximately 250 feet). The trial court further noted in its opinion that when defendant's finishing plant was moved across Carolina Avenue in the summer of 1962 (178 feet from plaintiff's store—with two residences located much closer), that *"it continued its finishing operations in the identical manner as these operations had earlier been carried on."* (P-App., p. 18) Judge Stanley commented that during this period of several years: "At no time did the defendant receive any complaint from the plaintiff or any residents of the area with respect to fumes and odors being exhausted from its plant." (P-App., p. 18).

Additionally, this opinion recites:

(1) "The defendant was operating a legitimate business and, so far as is disclosed by the evidence; was

operating its business in strict compliance with all applicable municipal and other governmental rules and regulations." (P-App., p. 18).

(2) "The plaintiff did not associate the difficulties he was experiencing in his store with the activities of the defendant, and the defendant had no knowledge of the plaintiff's odor problems until February 1, 1963, three days before the plaintiff closed his store." (P-App,. p. 18).

(3) "No odor problem has been experienced in the community since about two weeks after the plaintiff closed his store, and the defendant has at all times continued to operate its business *in the same manner as before.*" (P-App., p. 19).

The opinion of the Court of Appeals (Haynsworth, Chief Judge) affirmed the District Court's dismissal of this action, again applying, *after exhaustive analysis,* the substantive law of North Carolina.

ARGUMENT

1. The decision of the Court of Appeals, affirming the decision of the District Court, is not in conflict with the substantive law of North Carolina.

Petitioner's sole ground for requesting this Court to review the judgment below is his contention that it is not in accord with the substantive law of North Carolina as reflected by the decisions of the North Carolina Supreme Court. Both the trial and appellate courts were consciously aware of the unique facts of this case in reaching their

respective decisions. Petitioner fails to mention these distinguishing factors in his petition.

The opinions below both pay tribute to the efforts by the North Carolina Supreme Court to define with some degree of clarity the basic principles of the law of nuisance and apply them to the facts of each case. In an effort to analyze and distill these basic principles, the North Carolina Supreme Court in *Morgan* v. *High Penn Oil Co.*, 238 N.C. 185, 77 S.E. 2d 682 (1954), said:

> "Much confusion exists in respect to the legal basis of liability in the law of private nuisance because of the deplorable tendency of the courts to call everything a nuisance, and let it go at that. (Citations omitted) The confusion on this score vanishes in large part, however, when proper heed is paid to the sound propositions that private nuisance is a field of tort liability rather than a single type of tortious conduct; that the feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that any substantial nontrespassory invasion of another's interest in the private use and enjoyment of land *by any type of liability forming conduct* is a private nuisance; that the invasion which subjects a person to liability for private nuisance may be either intentional or unintentional; that a person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case; and that a person is subject to liability for an unintentional invasion when his conduct is negligent, reckless or ultrahazardous."

In *Morgan* v. *High Penn Oil Co.*, the Court cited both the *"Scope and Introduction Note to Chapter 40, American Law Institute's Restatement of the Law of Torts"* and *Section 825, Restatement of the Law of Torts.*

It is significant to note that the North Carolina Supreme Court, in addition to the Restatement Law, although citing eighty-eight (88) cases in its opinion in the *Morgan* case, neither *cited, mentioned,* nor *relied* upon the ancient doctrine of *Rylands* v. *Fletcher*, L.R. 3, H.L. 330.

Later, in 1962, the North Carolina Supreme Court, in *Watts* v. *Pima Manufacturing Co.*, 256 N.C. 611, 124 S.E. 2d 809, again relied on the *Restatement Rules* by citing Vol. 4, section 286, *Comments* a. and b. pp. 241-242, and Vol. 4, section 822, *Comments* g. and j., pp. 229 and 231. The Court, in applying these rules, pointed out that on the issue of reasonableness "no single factor is decisive; *all circumstances in a particular case must be considered.*"

The opinion of Judge Haynsworth analyzes in depth the pertinent decisions of the North Carolina Supreme Court After reviewing these authorities, Judge Haynsworth concluded:

> "North Carolina's Supreme Court, both substantively and verbally, has embraced the Restatement's Chapter 40 formulation and applied those principles in noxious gas cases. The court's language, simply but *emphatically, forecloses any suggestion that its embrace has been tentative, reluctant or reserved.*
>
> "Since, in this diversity case, we are required to apply North Carolina law, as declared by its highest court,

> we are not at liberty to disregard what it has done and said or, by a process of inference from extracted words not immediately germane, to attribute meanings to its opinions which are in conflict with the plain and unequivocal language that court has used in those same opinions when directly discussing the precise question before us" (P-App., p. 27).

It is clear the judgment below is in strict accord with the substantive law of North Carolina when such law is applied to the facts of this case. There is no conflict when it is readily apparent the State court would have been compelled to reach the precise result if confronted with the circumstances disclosed here. For this reason, the petition should be denied.

2. This case turns upon the facts peculiar to it and therefore presents no important question which would affect other litigants.

As previously indicated, the facts of this case, including those found by the trial court, create a set of circumstances unique in character. Some of these circumstances are: Petitioner' store and defendant's plant had operated in close proximity to each other (250 feet—178 feet) from 1954 until 1963, a period of nine years. (T-162, DX-1, T-602, DX-2). The odor problem complained of by plaintiff occurred in January 1963. (T-164) Plaintiff did not associate the difficulties he was experiencing in this store with the activities of the defendant, and defendant had no knowledge of the plaintiff's odor problem until February 1, 1963, three days before plaintiff closed his store. (P-App., p. 18). The defendant, both before, after, and during the odor problem, operated its business *in the same manner*. (P-App., p. 19).

Persons residing in homes directly between petitioner's store and defendant's plant never had food acquire an off-taste; never noticed any unusual odor in the neighborhood; and never had any problem of any sort at any time in respect to taste in food or odor in the atmosphere. (Appendix to Def. Brief in Court of Appeals, pp. 1-13, incl.). There has been no odor problem since February, 1963, although defendant's plant *has continued to operate in the same manner as before* (P-App., p. 19).

The foregoing are only a sampling of numerous facts which distinguish this case. In applying the basic principles of law to the instant case, the trial court specifically cited *Restatement of the Law of Torts,* sec. 822(m):

> "There is no general rule of law that one acts at his peril in respect to interference with another's use or enjoyment of his land, and therefore when such interferences are purely accidental the actor is not liable for causing them. It is only when unintentional invasions are caused by another's conduct which is negligent, reckless or ultrahazardous that the law subjects the actor to the liability."

and Section 825(a):

> "It is the knowledge which the actor has at the time he acts or fails to act that determines whether the invasion which results from his conduct is intentional or unintentional. It is not enough to make an invasion intentional that the actor realizes or should realize that his conduct involves a serious risk or likelihood of causing such an invasion. He must either act for the purpose of causing it or know that it is resulting or is substantially certain to result from his conduct."

noting the clear adherence to the Restatement Rules evidenced by the North Carolina Supreme Court. The question for which Petitioner seeks review is narrow is scope and devoted to the unusual facts of this case. The substantive law having been properly applied, there is nothing for this Court to review.

3. The decision of the Court of Appeals is correct.

Petitioner attacks the decision of the Court of Appeals as being predicated upon an erroneous interpretation of the substantive law of North Carolina. This attack consists of an attempt to destroy the clear intent of the State court by extracting isolated statements, totally devoid of application to the factual background, and contending that such statements represent the law of North Carolina. Petitioner apparently concedes that the law applied to the facts of this case by the District Court and the Court of Appeals results in the conclusion reached by both courts. His position is simply that the law applied is not the North Carolina substantive law.

The decision below, rendered by Judge Haynsworth demonstrates a careful, in depth, analysis of all of the case authority upon which petitioner relies. It would be useless repetition for Respondent to repeat here what was so clearly pronounced in Judge Haynsworth's opinion. Respondent is content to rest its case upon the opinion of the Court of Appeals. The decision extracts the wheat from the chaff. It separates inference from application of law to facts. It distills the North Carolina Supreme Court opinions to their basic holding as applied to the facts of each case before it. Having done this with a concise and logical approach, the law applicable to the case is clear. It is the law of North

Carolina. It was properly applied by the District Court and the Court of Appeals to the facts before them. The attack on the decision by Petitioner is without merit. His petition should be denied.

CONCLUSION

For the reasons above set forth, Respondent respectfully requests this Court for the entry of an order denying the Petition for a Writ of Certiorari.

Respectfully submitted,

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